UNITED STATES DEPARTMENT OF LABOR

Persuader Final Rule

Questions and Answers

Q: How does this rule help workers / worker voice?

A: This rule gives workers information about the source of the views, materials, and policies that are being used to influence their decisions about how to exercise their right to choose union representation or engage in collective bargaining. With more transparency, workers will be able to better assess the merits of the arguments directed at them and make more informed choices when they understand that the information they are receiving about the union originates with paid outsiders, not their employers or supervisors. Workers who understand that an outsider has been hired to persuade them can better weigh the common claim that bringing an "outside" or "third party" union into the workplace will disrupt the worker-employer relationship, or otherwise be counterproductive to the workers' interests. Knowing that their employer is spending money on outside consultants when faced with a union organizing drive also could help workers assess the employers' claims about their financial situation.

Q: How does the rule promote stable labor-management relations?

A: When workers are better informed about their employer's message on union representation, the integrity of the election process is stronger. Whether the union wins or loses, an informed workforce is in a better position to accept the outcome, build trust, and promote stable labor-management relations.

Q: Does the LMRDA authorize the Department to adopt this interpretation? Why hasn't the Department done it before?

A: The LMRDA authorizes the Department to require disclosure of consultant activities undertaken with an object, "directly or indirectly," to persuade employees, but employers and consultants do not need to file a report covering services by reason of giving "advice." But the Department's previous definition of "advice" was so broad that it effectively eliminated "indirect" reporting. Congressional hearings and academic studies over the years have noted that the lack of disclosure of persuader agreements is a problem. After initially taking an expansive view of the employer-consultant reporting requirements, the Department re-interpreted the "advice" exemption in 1962 to exempt nearly all indirect persuader activities as advice. The Department subsequently attempted to expand the reporting requirements in a similar manner as today through subregulatory guidance in the early 2000s, but this effort was rescinded by subsequent action. Section 208 of the LMRDA grants the Department authorization to "issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed" under the reporting and disclosure title of the Act, and the Department's revised interpretation is fully consistent with the text and intent of the law.

The Obama Administration undertook this effort in order to assess whether the regulations best effectuated Congressional intent. The process of finalizing this regulation was a long and careful process with input from many stakeholders.

Q: How is this provision of the LMRDA enforced today, and how will that change under this rule?

A: The way that the rule is enforced will not change -- the Department's Office of Labor-Management Standards (OLMS) will employ the same enforcement procedures it has in the past. This rule revises two existing forms, Form LM-10 (filed by employers) and Form LM-20 (filed by labor relations consultants), neither of which are new. The revisions to the forms will better effectuate the full disclosure intended by Congress. OLMS investigations are initiated based on various sources such as complaints from union members and workers; information developed by OLMS as a result of reviewing reports filed; and information developed during an OLMS audit of a union's books and records.

Q: How many workers will be affected by this rule?

A: The rule will primarily affect employees faced with deciding to support or oppose a union's effort to represent their workplace. While the number will vary from year to year, according to NLRB data, more than 100,000 workers had the opportunity to decide whether a union should represent them in FY 2015. Studies suggest that 71-87% of employers retain persuaders in representation campaigns. Tens of thousands of workers would thus have been more fully informed about their decision on representation under this rule. There is also evidence that shows that not all union representation campaigns involve the NLRB election process, and because the rule also requires persuader and employer disclosures when employers retain persuaders in collective bargaining situations, thousands of additional workers not involved in NLRB elections will also have access to information relevant to important decisions about how to exercise their rights.

Q: Is this rule burdensome for employers / consultants? What about small businesses? What kind of reports will need to be filed?

A: This rule does not impose a large burden on employers or consultants. The rule does not require employers or consultants take any actions other than filing a disclosure form, and those disclosures are expected to result in a total burden of just over $7 million each year, significantly less than the $100 million threshold for rules to be considered to have a significant economic impact.

The relevant forms – the LM-20 consultant report and LM-10 employer report – are only 2 and 4 pages, respectively, and consist of checkboxes and a space for a short narrative description of the agreement or arrangement.

The Department estimates that it will receive 4,194 Form LM-20 reports from consultants and 2,777 Form LM-10 employer reports. The Department estimates that it will take 98 minutes to complete the LM-20 form at a cost of $151.14 per form and that it will take 147 minutes to complete the LM-10 form at a cost of $226.70 per form. Even if all entities required to file are small businesses, the small cost is not a significant economic impact on a substantial number of small businesses.

While the Department also estimates that several hundred thousand employers and consultants will need to review the instructions to determine that no reporting is required, this review results in an estimated burden of only one hour for consultants and one half-hour for employers, costing less than $100 per entity. Again, this does not result in a significant economic impact on a substantial number of small businesses.

Q: How does the rule apply to seminars and trade associations?

A: Presenters at union avoidance seminars must file persuader reports, but employers attending those seminars need not file such reports.

Trade associations do not have to file reports for hosting union avoidance seminars unless their employees are also serving as presenters.

A trade association is not required to report if it selects off-the-shelf materials for distribution to one or more employers, but it must report if its employees undertake direct or indirect persuader activities on behalf of employers.

Q: How is the final rule different than the proposed rule? How did you take commenters' concerns into account?

A: The Department made several changes to the rule:

- The final rule adds clarity by plainly identifying persuader activities that trigger reporting (direct persuasion and four sub-categories of indirect persuasion: providing persuader materials; directing supervisors; developing personnel policies and actions; and presenting union-avoidance seminars).
- The final rule no longer requires employers to report their attendance at a union avoidance seminar.
- Trade associations will generally be required to report only in two situations – where the trade association's employees serve as presenters in union avoidance seminars or where they undertake persuader activities for a particular employer or employers. Trade associations that organize union avoidance seminars but do not present will not have to report.
- The rule narrowed the situations in which persuader activity had to be reported to cover only activities undertaken to influence employees about union organizing and collective bargaining. "Protected concerted activities" have been removed from the definition of "object to persuade employees." Persuasion efforts around broader efforts to promote concerted activities (aside from organizing and collective bargaining) no longer trigger reporting requirements.
- Agreements need not be reported if they exclusively consist of providing pre-existing or off-the-shelf materials, such as stock videos or anti-union

campaign documents, selected by an employer. Where a consultant agrees to select particular material for an employer, however, the agreement must be reported.

- Burden numbers have been clarified, including identifying the number of Form LM-20 reports covering union avoidance seminars and acknowledging that the rule imposes a burden on certain non-filers as well as the filers.

Q: How many indirect persuader reports do you get now? Do you really need this rule?

A: The Department currently receives zero indirect persuader reports. Further, while the Department receives a few hundred Form LM-20 reports annually covering direct persuader agreements, this only covers a small fraction of the total persuader agreements entered into. Indeed, studies suggest that 71-87% of employers hire persuaders when faced with a union organizing campaign, with most of these agreements not currently being reported. This rule will provide needed transparency to workers concerning the numerous persuader agreements not currently being reported.

Q: What kind of information do unions have to disclose? Do they have to disclose the same information as required by this rule?

A: As a general matter, most unions already must disclose far more information than is being required under this Rule. The largest unions (i.e., those with $250,000 or more in total annual receipts) must file the Form LM-2 annual financial report, which itemizes payments that total $5,000 or more in a year to a single entity, including the union's law firms and consultants. The union must disclose the identity of the recipient, the amount paid, and the purpose of the payments. The union discloses significantly greater information than employers or consultants, as they must disclose payments to all parties, not just consultants. Further, they must disclose payments to all of their officers and employees, as well as group such payments into functional categories (e.g., representational and organizing activities); employers generally do not have to report such payments to their own officers and employees. Union reports filed with OLMS can be hundreds of pages long.

Q: Does this rule require disclosure of information protected by the principle of attorney-client privilege?

A: No. None of the information required to be reported (e.g., the identity of the parties, terms and conditions of the agreement, and specific persuader activities undertaken) is covered by the attorney-client privilege. Privileged information is excluded from the reporting requirement by statute.

The Department took the same basic position with respect to reports required to be filed by unions about their annual expenditures in the Department's 2003 rule, which has been effective since 2005.